No. 83-712

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Petitioner,

—vs.—

T.L.O., a Juvenile,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and protecting the liberties guaranteed in the Constitution. The American Civil Liberties Union of New Jersey is one of its state affiliates, which previously filed a brief amicus curiae in this case with the New Jersey Supreme Court.

The ACLU and its affiliates have devoted particular attention in recent years to the rights of groups who, because of their exclusion from the political process for various reasons, are in particular need of the anti-majoritarian protections of the Bill of Rights. Our experience working with students has convinced us that their Fourth Amendment rights are especially important, in order to

protect them from harms of unreasonable, arbitrary, or intrusive searches, and, as the New Jersey Supreme Court observed in the words of Justice Jackson, to "educat[e] the young for citizenship...[and to ensure that our young are not taught] to discount important principles of our government as platitudes."

We therefore file this brief amici curiae, with the consent of the parties,[1] to demonstrate that the understandable and valid concerns for school safety and the preservation of an effective learning environment that petitioner and its amici raise do not come close to justifying the wholesale removal of effective Fourth Amendment rights at the schoolhouse gate.

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1. Letters of consent are being filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. This Court has consistently held that juveniles, as well as adults, are "persons" whose rights are to be protected from governmental intrusion under the United States Constitution. A juvenile does not shed these constitutional rights, including the right to be free from unreasonable searches under the Fourth Amendment by governmental agents, such as school officials, at the schoolhouse gate.

2. Where a juvenile manifests an expectation of privacy in an item such as her pocketbook, the juvenile does not abandon her right to privacy upon entering school. Since for every search of a student that uncovers evidence of wrongdoing, a plethora of innocent impressionable juveniles will have had their expectation of privacy shattered and their

right to be secure from unreasonable searches violated, it is essential that juveniles' Fourth Amendment rights be protected in and out of school.

3. The exclusionary rule is no less vital where the search is conducted in school than where it is conducted in similar non-law enforcement administrative contexts. Applying the exclusionary rule would inhibit collusion between school officials and the police, deter arbitrary and unchecked searches of students by school officials, and provide a meaningful mechanism for discouraging unwarranted invasions of the right of juveniles to be secure from unreasonable searches and seizure.

4. The doctrine of in loco parentis, which was created as a benevolent means to protect juveniles, cannot be applied to deny juveniles essential constitutional rights.

In addition, since school officials more closely represent the interests of the State than the parents (or juveniles), they should be held to a probable cause standard before they are allowed to search the juveniles.

5. The decision by the New Jersey Supreme Court, although not requiring school officials to satisfy the probable cause requirement before searching a student, at least attempts to balance the need of school officials to conduct reasonable searches of students in school with the right of students to be free from unreasonable searches and seizures. The New Jersey Supreme Court's "reasonable grounds" standard at least would prevent arbitrary and capricious searches by school officials and provide some protection for students to be free from unreasonable searches and seizures.

ARGUMENT

I. JUVENILES DO NOT SHED THEIR FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES AT THE SCHOOLHOUSE GATE.

Although it has not been and could not be seriously argued that juveniles, as well as adults, are not "persons" who are protected from unreasonable searches by governmental officials outside of the school setting, the Petitioner in this matter essentially is arguing that juveniles lose this constitutional protection upon entering school. However, this Court consistently has held that students do not shed their constitutional rights at the schoolhouse gate. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (Fourteenth Amendment due process clause applicable to student suspensions because a suspension constitutes a deprivation of the student's property rights); Tinker v. Des

Moines Indep. Community School Dist., 393 U.S. 503 (1969)(First Amendment rights are applicable to students because students are persons under the Constitution); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (since the Constitution protects all citizens, adults and children alike, students cannot be compelled to pledge allegience to the flag).[2]

The Fourth Amendment protects "persons," including adults and juveniles who are in school or out of school, from unreasonable searches by governmental officials. See Washington v. Chrisman, 455 U.S. 1 (1982)

2. Underlying these decisions is the holding that the conduct of school officials, as "governmental agents," involves state action and the students therefore must be afforded the protections of the United States Constitution. See also Board of Educ. v. Pico, 457 U.S. 853 (1982); Ingraham v. Wright, 430 U.S. 651 (1977); Wood v. Strickland, 420 U.S. 308 (1975).

(university student protected by the Fourth Amendment where his property was searched by a school official who was employed as a security guard).[3] As this Court emphatically declared in the landmark decision of Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 511:

> Students in school as well as out of school are "persons" under our Constitution. They are posssessed of fundamental rights which the State must respect.

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3. See also N.J. Stat. Ann. 2A:4A-40 (West Supp. 1983), in which the New Jersey Legislature specifically mandated that this protection be applied fully to juveniles. This Statute, which provides in pertinent part that "(a)ll defenses available to an adult charged with a crime, offense, or violation shall be available to a juvenile charged with commiting an act of delinquency," superseded N.J. Stat. Ann. 2A:4-60, which contained identical language and was cited in State in Interest of T.L.O., 94 N.J. 331, 342n.5 (1983). Based upon this Statute and for the reasons advanced by the Respondent, it is respectfully submitted that this Court improvidently granted certiorari and is precluded from deciding in this case whether juveniles have less Fourth Amendment rights in the school setting than adults.

Under the Fourth Amendment, any warrantless search of a person or his/her property is prima facie invalid and gains validity only if it comes within one of the specific exceptions that have been created by this Court. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The only such exception to the Fourth Amendment that deals, as here, with a search by a non-police governmental official, involves administrative searches by officials who are not concerned with law enforcement per se, but rather are concerned with virtually the same type of administrative supervision and inspection as public school officials. See, e.g., Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspectors from the Occupational Safety and Health Administration); Michigan v. Tyler, 436 U.S. 499 (1978) (firefighters); Camara v. Municipal

Court, 387 U.S. 523 (1967) (building inspectors); Jones v. United States, 357 U.S. 493 (1958)(federal alcohol agents).

As Justice White explained for the majority in Marshall v. Barlow's, Inc., 436 U.S. at 312-313,

> the Fourth Amendment prohibition against unreasonable searches protects against warrantless intrusions during civil as well as criminal investigations. Ibid. The reason is found in the "basic purpose of this Amendment. . . [which] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara, supra, at 528, 18 L Ed 2d 930, 87 S Ct 1727. If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.

Since "(t)he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when

to search and whom to search," id. at 323, this Court required probable cause for the search either by a showing of specific evidence of an existing violation or a showing that reasonable legislative or administrative standards have been satisfied with regard to the particular property. Id. at 320.

As with the inspectors in Marshall v. Barlow's, Inc., as well as the other administrative search cases, public school officials are charged with the responsibility for maintaining the safety of property and people, in this case schools and the students who attend them. Indeed, at least in New Jersey, school officials are required by statute to maintain order in the schools, see N.J.Stat.Ann. 18A:25-2 (West Supp. 1983), in much the same way as the inspectors in

Marshall were required by the Occupational Safety and Health Act (OSHA), 29 U.S.C. §651-678 (1983), to maintain safety and health in the workplace.

In addition, the repercussions that may be suffered by a juvenile are no less severe than those that may be suffered by an employer whose business is inspected under OSHA. Even putting aside the plethora of innocent impressionable students who would be traumatized by being searched,[4] a student who is searched faces the loss of significant property and liberty rights, such as expulsion or suspension from school, decreased opportunities for acceptance into an institution of higher learning, and increased difficulty in obtaining many jobs. The

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4. The potentially lifelong trauma that can result from such searches of juveniles is discussed at length in Point II, infra.

student also faces, as here, criminal sanctions as a result of such a search.[5]

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5. As explained by the American Bar Association's Institute of Judicial Administration in ABA Standards Relating to Schools and Education 1 (1982):

> The school is also an important part of the system of juvenile justice. The law in the United States compels children to attend school. A. Steinhilber and C. Sokolowski, State Laws on Compulsory Attendance (1966). In school the child is subjected to an extensive body of rules, the violation of which results in various forms of punishment (or "discipline"). Not infrequently a sanction entails exclusion from school--a sentencing to the life of the streets. From there, a child may pursue a course of conduct that will bring him or her within the jurisdiction of the juvenile court. There is a close correlation between children in trouble in school and children in trouble with the law.

The ABA therefore recommended that if "the sanction that might result from the suspected misconduct includes expulsion, long-term suspension, or transfer to a school used or designated as a school for problem students of any kind, the search should be subject to all of the requirements of a police search." Id. at p. 31, §8.7B. In addition, "(a)ny evidence obtained directly or indirectly as a result of a search in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in either criminal or disciplinary sanctions against the student." Id., §8.8.

There is simply no basis in the law or logic to deny a juvenile these Fourth Amendment safeguards while at the same time subjecting the juvenile to the loss of these property rights and criminal punishment. Thus, as in the administrative search cases, school officials should be required to have probable cause before searching a student.

II. JUVENILES DO NOT ABANDON THEIR EXPECTATION OF PRIVACY BY ATTENDING SCHOOL.

Where, as here, a juvenile (or an adult) manifests an expectation of privacy in an item such as her pocketbook, which society generally recognizes as a reasonable expectation, the juvenile's right to maintain this privacy should not be affected by being in or out of school. See Smith v. Maryland, 442 U.S. 735, 740-741 (1979); United States v. Knotts,_____ U.S.____ , ____, 103 S.Ct.

1081, 1084-1085 (1983). See also Doe v. Renfrow, 451 U.S. 1022 (1981)(Brennan, J., dissenting from the denial of a petition for a writ of certiorari). Cf. Arkansas v. Sanders, 442 U.S. 753 (1979). In the similar situation involving a non-police governmental official, a firefighter whose purpose was to search a building for evidence of arson, this Court in Michigan v. Tyler, 436 U.S. 499, 506 (1978), explained that

> there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment.

Accord Michigan v. Clifford, ____ U.S. ____, 104 S. Ct. 641 (1984).

A student's reasonable expectation of privacy is no less diminished because the official who is conducting the search is wearing the "uniform" of an educator and is investigating a suspected problem in the school. This expectation of privacy, especially in a repository for personal items, such as the student's own pocketbook in the present case, is not left outside when the student enters school.[6]

The right of juveniles in and out of school to such an expectation of privacy from governmental intrusion must remain paramount when dealing with impressionable youths who are formulating a sense of their own being,

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6. Curiously, it is unclear what, if anything, the school official who searched T.L.O. suspected was in her pocketbook. Even if he suspected that she had cigarettes, possession of cigarettes on school grounds was not a violation of school rules. In fact, the school had designated areas for the students to smoke cigarettes.

as well as respect for societal values. For every search of a student that uncovers evidence of wrongdoing, countless innocent students will have had their expectation of privacy shattered and their right to be secure from such searches violated. As William Buss succinctly wrote in "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 792 (1974):

> There is a very good chance that an erosion of privacy and the destruction of human values that go with privacy is a greater long-range danger than the behavior that would be detected and deterred by student searches. It would be highly desirable if the citizens of the United States who are now in school learn to value privacy, learn by the school's example that the society respects it, and learn that the courts will protect it from invasion by governmental searches that violate fourth amendment principles.

Thus, the constitutional right of juveniles to be free from unreasonable searches and seizures when they enter school should be

jealously protected by this Court. Juveniles' rights cannot be violated due to the fear of the use of drugs either outside or inside school or simply as an expediency to maintain school discipline.[7] Constitutional rights cannot be shed so easily. Indeed, there can be no question that the Constitution "protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

III. THE NECESSITY FOR THE EXCLUSIONARY RULE IS NO LESS VITAL IN THE EDUCATIONAL SYSTEM THAN IN SIMILAR NON-LAW ENFORCEMENT CONTEXTS.

The State appropriately acknowledges

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7. As Justice Brennan aptly pointed out in Florida v. Royer, ____ U.S. ____, _____, 103 S.Ct. 1319, 1332 (1983)(concurring opinion), "(a)lthough I recognize that the traffic in illicit drugs is a matter of pressing national concern, that cannot excuse this Court from exercising its unflagging duty to strike down official activity that exceeds the confines of the Constitution."

that public school officials are governmental agents and that the Fourth Amendment applies to the search of students but argues that the exclusionary rule should not be applied to the school setting. The exclusionary rule is no less vital for the enforcement of the Fourth Amendment rights of juveniles in school (and out of school) than for adults who are searched by similar non-law enforcement officials to whom this Court has applied the exclusionary rule. See, e.g., Michigan v. Clifford, ___ U.S. ____, 104 S.Ct. 641 (1984)(fire department investigators); Michigan v. Tyler, 436 U.S. 499 (1978)(firefighting officials); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (inspectors for the Occupa-

tional Safety and Health Administration).[8] See also Donovan v. Dewey, 452 U.S. 594, 604 (1981)(the requirements of the Fourth Amendment are satisfied regarding the search of a mine where "rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, the Act [the Mine Safety and Health Act, 30 U.S.C. §801-962 (West Supp. 1983)] establishes a predictable and guided federal regulatory presence."). As Justice White explained for the majority in Camara v. Municipal Court, 387 U.S. 523, 528 (1967), "(t)he basic purpose of this Amendment, as recognized in countless

8. The exclusionary rule also recently has been applied where, as in the case of a student who is called into the office of a school administrator, a suspect who was detained did not believe he was free to leave the room in which the search was conducted. Florida v. Royer, _____ U.S. _____, 103 S.Ct. 1319 (1983).

decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," not only the police.

In addition, the exclusionary rule has no less a deterrent effect regarding such arbitrary invasions in the school setting than it does in other administrative settings. For example, since evidence seized during searches by school and other administrative officials often is turned over to the police for use in criminal proceedings, applying the exclusionary rule also would unquestionably inhibit collusion between school officials and the police.[9]

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9. As explained in Camara v. Municipal Court, 387 U.S. 523, 530-531 (1967), where regulations for maintaining order are enforceable by criminal sanctions, the Fourth Amendment's protections are critical:

(Footnote 9 continued on next page)...

In this regard, this situation is virtually indistinguishable from the "silver platter doctrine," which this Court emphatically rejected in Elkins v. United States, 364 U.S. 206 (1960) (evidence obtained by State

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...(Footnote 9 continued from preceding page)

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.... Like most regulatory laws, fire, health and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint.

If the Fourth Amendment is to be anything other than a hollow unenforceable right for juveniles, the exclusionary rule also must be applied to safeguard juveniles who otherwise would wrongfully be subjected to criminal sanctions as a result of searches by school officials. This is especially true in States that require school officials to report evidence of criminal activity to the police. See, e.g., Ala. Code §16-1-24 (Supp. 1983); Cal. Educ. Code §48902 (West Supp. 1983); Conn. Gen. Stat. Ann. § 10-233g (West Supp. 1983); Ill. Ann. Stat. ch. 122 §10-21.7 (Smith-Hurd Supp. 1982); Tenn. Code Ann. §§ 49-6-4209, 4301 (1983).

officials during an illegal search cannot be used by federal officials). As this Court held in Elkins, although cooperation between various governmental entities is to be encouraged, where one of those entities is not entitled to conduct a search in order to obtain evidence, it can neither directly or indirectly encourage another entity to obtain such evidence nor accept such evidence from the other governmental entity:

> Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by state agents will

be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.

Id. at 221-222.[10]

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10. Not only would the exclusionary rule deter any such collusion between school officials and the police, but judicial integrity also would be enhanced because the courts would not be placed in the position of admitting evidence in a criminal proceeding that, if seized by the police rather than the school official, would have been inadmissible. See Stone v. Powell, 428 U.S. 465, 485-486 (1976); Lee v. Florida, 392 U.S. 378, 385-386 (1968). Indeed, research has revealed no case decided by this Court in which evidence that was improperly seized by a non-police governmental official was permitted to be used in a criminal proceeding by the prosecution.

Similarly, school officials must be deterred from arbitrarily searching students and then turning over any evidence of wrongdoing that they are lucky enough to find to the police on a "silver platter." Students' constitutional rights cannot be forfeited simply because of the whim of or a rash act by a school official, especially where the school official is under a duty imposed by a statute,[11] board of education directive, or otherwise, to turn evidence over to the police. Since it is clear that no other mechanism for enforcing Fourth Amendment rights in the school context is available,[12]

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11. See Statutes cited in footnote 9, supra.

12. Damage awards generally have been barred by the good faith defense as the New Jersey Supreme Court observed, State in Interest of T.L.O., 94 N.J. 331, 349 (1983), and, in any event, are hardly preferrable to suppression from the school officials' point of view. In addition, injunctive actions effectively have been barred by City of Los Angeles v. Lyons, ____ U.S. ____, 103 S.Ct. 1660 (1983).

only by applying the exclusionary rule to such non-police administrative searches can these juveniles be protected from such unwarranted invasions of their basic Fourth Amendment right to be free from unreasonable searches and seizures.

IV. THE BENEVOLENT CONCEPT OF *IN LOCO PARENTIS* CANNOT BE APPLIED TO DENY JUVENILES THE ESSENTIAL PROTECTIONS OF THE FOURTH AMENDMENT.

A few early lower court decisions improperly excluded students from the protection of the Fourth Amendment based upon the erroneous assumption that the doctrine of *in loco parentis* justified this exclusion. However, "(w)hile the doctrine of *in loco parentis* places the school teacher or employee in the role of a parent for some purposes, that doctrine cannot transcend constitutional rights." *Jones v. Latexo Indep. School*

Dist., 499 F. Supp. 223, 229 (E.D. Tex. 1980). Accord Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976).

As this Court noted in In re Gault, 387 U.S. 1, 16 (1967) (due process rights cannot be denied on the basis of in loco parentis), in the past, in loco parentis and the phrase parens patriae "proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."[13]

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13. In In re Gault, this Court held that because a juvenile delinquency proceeding may lead to incarceration of the juvenile (as a search and seizure may lead to the juvenile proceeding), a juvenile has the constitutional right to due process of law and the privilege against self-incrimination. With regard to a juvenile's Fifth Amendment rights, this Court explained: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals,

(Footnote 13 continued on next page)...

In Kent v. United States, 383 U.S. 541 (1966), this Court held that juveniles could not be denied their constitutional rights in our juvenile courts under the concept of parens patriae, regardless of how benevolent the purpose may be. The role of these juvenile courts is virtually identical to

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...(Footnote 13 continued from preceding page)

but not to children." 387 U.S. at 47. It would be similarly surprising if a child in or out of school could refuse to incriminate herself verbally but could not refuse to reveal physically incriminating evidence where probable cause to search does not exist.

This Court has recognized that juveniles also are entitled to other constitutional rights. See, e.g., In re Winship, 397 U.S. 358 (1970) (a juvenile cannot be convicted in a criminal prosecution, except upon proof beyond a reasonable doubt); Kent v. United States, 383 U.S. 541 (1966) (hearing for a juvenile must meet the essentials of due process and fair treatment); Gallegos v. Colorado, 370 U.S. 49 (1962) (confession taken from a juvenile violated his due process rights); Haley v. Ohio, 332 U.S. 596 (1948) (confession obtained from juvenile violated the juvenile's Fourteenth Amendment rights).

the role of our educational system insofar as both are responsible for molding the attitudes of and protecting our children. In addition, as in our schools today, although the juvenile courts then did not have the resources to cope with all the demands that were placed upon them, it was explained that the rights of the juveniles could not be compromised:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts. . . lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Id. at 555-556 (footnotes omitted).

In addition, the application of the in loco parentis doctrine to our present educational system ignores reality for two reasons. First, under this doctrine, public school officials do not acquire the same rights as parents have vis-a-vis their children. Second, public school officials act in concert with police officials by reporting findings of suspected criminal wrongdoing by juveniles in school and, as such, represent the interests of the police and State more than the parents or juveniles.

First, there can be no dispute that school officials do not have the same rights as parents with regard to juveniles. Under the concept of in loco parentis, a parent "may. . . delegate part of his parental authority during his life to the tutor or schoolmaster of his child; who is then in loco parentis and has such a portion of the

power of the parent committed to his charge." 1 W. Blackstone, Commentaries 453 (emphasis added).[14] It cannot seriously be argued that parents have chosen to delegate to school officials all of their parental powers. In any event, the parents who would delegate the power to search their child and turn over the evidence to the police would certainly be the exception, not the rule.

It also is well settled that where a juvenile's constitutional rights are involved, a school official, as a governmental officer, does not have the same right to discipline the juvenile or otherwise impinge upon the juvenile's rights as the juvenile's parents. Thus, for example, parents may discipline their child for a peaceful, nondisruptive expression of the child's political beliefs,

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14. Quoted in In re G.C., 121 N.J. Super. 108, 116, 296 A.2d 102, 106 (J. & D.R. Ct. 1972).

and may dictate whether or not the child prays or salutes the flag, whereas a public school official cannot. See, e.g., Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Similarly, in New Jersey, although parents may physically punish their child, a public school official is prohibited from inflicting corporal punishment on a student. See N.J. Stat. Ann. 18A:6-1 (West 1968).

Second, there can be no question that as in the present case public school officials routinely turn over to law enforcement authorities not only evidence of suspected wrongdoing by students, but also the students who are suspected of having committed the wrongful act. Indeed, several States require school officials to report evidence of

criminal activity to the police.[15] Parents, however, do not have any such responsibility to and generally do not report wrongdoing by their children, even where the parents discover marijuana in their child's possession. Thus, although a cooperative effort by school officials and the police may be perceived as necessary to maintain discipline in the schools, it nevertheless firmly negates the fiction of in loco parentis and solidifies the role of public school officials as arms of the State.[16]

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15. See Statutes cited in footnote 9, supra.

16. The fallacy of applying in loco parentis to the search of a juvenile by a public school official has been summarized in Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739, 768 (1974), as follows:

> Insofar as in loco parentis sums up the peculiar school-student relationship and the school's related interest in searching students, it focuses almost entirely on protection of the other students and on coercive power over

(Footnote 16 continued on next page)...

Accordingly, in the context of searches and seizures, there is no reason to treat public school officials any different than other non-police governmental officials who have been entrusted with the safety and well-being of our society. School officials

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...(Footnote 16 continued from preceding page)

the searched student. One of the things that makes in loco parentis such an erroneous phrase in this context is precisely the absence of a genuinely parental protective concern for the student who is threatened with the school's power. It is presumably a characteristic of the use of parental force against a child that the force is tempered by understanding and love based on a close, intimate, and permanent child-parent relationship. What so many of the courts persist in talking about as a parental relationship between school and student is really a law enforcement relationship in which the general student society is protected from the harms of anti-social conduct. As such, it should be subjected to law enforcement rules.

should be held to the same standards as these other governmental officials and juveniles should be free from searches by any of these officials unless there is probable cause for the search, whether the search is conducted in school or out of school.[17] Picha v. Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976); State v. Mora, 307 So. 2d 317 (La.), vacated and remanded, 423 U.S. 809 (1975), on remand, 330 So. 2d 900 (La. 1976). See State v. Walker, 528 P.2d 113 (Or. Ct. App. 1974); People v. Cohen, 57 Misc. 2d 366, 292

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17. The use of a standard lower than probable cause for the search of a juvenile in school has been severely criticized by commentators. See, e.g., Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L. Rev. 739 (1974); Cotton and Haage, "Students and the Fourth Amendment: 'The Torturable Class,'" 16 U. Calif. D.L. Rev. 709 (1983); Reder, "School Officials' Authority to Search Students is Augmented by the In Loco Parentis Doctrine," 5 Fla. St. L. Rev. 526 (1977); Schiff, "The Emergence of Student Rights to Privacy Under the Fourth Amendment," 34 Baylor L. Rev. 209 (1982); Trosch, Williams and DeVore, "Public School Searches and the Fourth Amendment," 11 J.L. & Educ. 41 (1982).

N.Y.S.2d 706 (Dist. Ct. 1968); State v. McKinnon, 558 P.2d 781 (Wash. 1977)(Rosellini, J., dissenting). See also Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich 1975); Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

V. ALTHOUGH THE NEW JERSEY SUPREME COURT HELD THAT SCHOOL OFFICIALS DO NOT HAVE TO SATISFY THE PROBABLE CAUSE REQUIREMENT IN ORDER TO SEARCH A STUDENT, THE STANDARD ESTABLISHED BY THAT COURT AT LEAST WOULD CONSTITUTIONALLY PROTECT STUDENTS FROM ARBITRARY SEARCHES BY SCHOOL OFFICIALS

The New Jersey Supreme Court held that a school official, as a governmental agent, has the right to conduct a reasonable search for evidence when the school official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." State in Interest of T.L.O., 94 N.J. 331, 346 (1983).

This decision is supported by a significant number of other lower court cases, which have applied the same or a similar standard.[18]

The standard set out in the New Jersey Supreme Court's opinion, which is a lower standard than this Court's decisions indicate is required, attempts to balance the need of school officials to conduct reasonable searches of students in school with the right of students to be free from unreasonable

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18. See, e.g., Horton v. Goose Creek Indep. School Dist., 677 F.2d 471 (5th Cir. 1982); Bilbrey v. Brown, 481 F. Supp. 26 (D. Or. 1979); In re W., 29 Cal. App. 3d 777 (Ct. App. 1973); In re C., 102 Cal. Rptr. 682 (Ct. App. 1972); State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); State v. F.W.E., 360 So. 2d 148 (Fla. Dist. Ct. App. 1978); People v. Ward, 233 N.W.2d 180 (Mich. Ct. App. 1975); Doe v. State, 540 P.2d 827 (N.M. Ct. App. 1975); People v. Singletary, 333 N.E.2d 369 (N.Y. 1975); People v. D., 315 N.E.2d 466 (N.Y. 1974); People v. Jackson, 319 N.Y.S.2d 731 (App. Div. 1971), aff'd, 284 N.E.2d 153 (N.Y. 1972); State v. McKinnon, 558 P.2d 781 (Wash. 1977); In re L.L., 280 N.W.2d 343 (Wis. Ct. App. 1979).

searches and seizures. The application of this standard also at least would prevent arbitrary and capricious searches by school officials and provide school officials with a common sense guideline for searching a student.

Certainly, school officials do not need, and undoubtedly would not want, the unbridled discretion to search students in any manner, at any time, and for any reason. Not only would it be the rare school administrator who would want to search a student without "reasonable grounds" to believe that the student possesses evidence of wrongdoing, but the United States Constitution mandates that at least such minimal protection be afforded to juveniles.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court apply the probable cause standard to the search and seizure of a juvenile by a school official or, in the alternative, affirm the decision of the New Jersey Supreme Court.

Respectfully submitted,

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Dated: February 16, 1984

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